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No. 88-919

# In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD MCCARTHY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's action under the Federal Tort Claims Act for damages arising from injuries suffered in a reservoir constructed for purposes of flood control.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 850 F.2d 558. The opinion of the district court (Pet. App. A10-A14) is reported at 654 F. Supp. 33.

### JURISDICTION

The judgment of the court of appeals was entered on June 28, 1988. A petition for rehearing was denied on September 12, 1988. Pet. App. A15. The petition for a writ of certiorari was filed on December 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner was injured when he dived into Lewisville Lake in Denton County, Texas, and struck his head on the lake bottom, fracturing his neck (Pet. App. A1-A2).

Lewisville Lake is a reservoir constructed by the Army Corps of Engineers for the purpose, among others, of flood control. Pet. App. A1. The Corps monitors the lake's water level daily and discharges water as necessary through a dam that was constructed in connection with the project (*ibid.*). Petitioner was injured at East Copperas Park, one of ten parks operated by the Corps as recreational facilities along the lake's perimeter (*id.* at A2). The park does not have a designated swimming area, but includes picnic tables, a boat ramp, and vehicle parking spaces (*ibid.*).

2. Petitioner filed this action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Northern District of California. The complaint alleged (Pet. App. A2):

> that the defendant [the United States] constructed, maintained, operated and controlled the premises on which plaintiff was injured; that defendant controlled the permitted access to the location where plaintiff was injured and encouraged use of the beach; that defendant had observed, but failed to prohibit, swimming and diving at that location; that the premises were dangerous and defective in several particularly described respects, and that defendant knew it; that despite such knowledge, defendant encouraged the public to dive there, failed to give any warning to foreseeable users of the beach of the known dangerous conditions, failed to prohibit diving, and failed to inspect the beach or to make it safe.

Relying on *United States* v. *James*, 478 U.S. 597 (1986), the district court held that the government was immune from liability under 33 U.S.C. 702c (Pet. App. A10-A14).[1]

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[1] Section 702c provides, in pertinent part:

No liability of any kind shall attach to or rest upon the United

3. The court of appeals affirmed (Pet. App. A1-A9). It found that because the waters of the lake were "clearly 'contained in' a federal flood control project" and were "monitored on a daily basis and discharged when necessary," they were "flood waters" within the meaning of Section 702c as interpreted in *James* (*id.* at A4-A5).

The court also held that there was a sufficient "nexus" for purposes of the statute "between the injury sustained by McCarthy and the operation of a Congressionally authorized federal flood control project" (Pet. App. A5). Explaining that *James* does not permit a distinction between "the active operation of a flood control facility and its passive or more static condition" (*id.* at A5), the court rejected petitioner's contention that Section 702c did not apply because his injuries did not result from any "tangible flood control activity or operation" (*ibid.*). The court observed that it would be difficult to distinguish between "active and passive" operations of flood control facilities (*id.* at A5-A6), because "a passive condition is invariably the result of other active forces which have gone before" (*id.* at A6). The court added that the lake's "multi-purpose nature" did not require a different conclusion (*ibid.*). Relying on its decision in *Morici Corp.* v. *United States*, 681 F.2d 645 (9th Cir. 1982), the court of appeals explained that Section 702c "can apply even though a federal project has multiple purposes and is not intended exclusively for flood control" and noted that it had previously rejected the position that "the applicability of the immunity provision * * * depends upon the particular purpose to which the project was being put when the negligence occurred." Pet. App. A6. After reviewing its other precedents, the court concluded that "the immunity provi-

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States for any damage from or by floods or flood waters at any place * * *.

sion of § 702c bars [petitioner's] suit for damages against the United States" (*id.* at A8).

Finally, the court rejected petitioner's contention that the government could be held liable based on an allegedly negligent failure to warn of hazards at Lewisville Lake. The court noted that *James* established that such failures to warn are considered part of the "management" of a flood control project (Pet. App. A8), and concluded, "McCarthy's injuries clearly occurred in flood control project waters, and so, under *James*, his claim of negligence regarding the failure to warn is not actionable." *Id.* at A8-A9.

## ARGUMENT

The court of appeals correctly applied this Court's decision in *James* to the facts of this case. Since *James*, no other court of appeals has had occasion to consider the application of that decision to a similar claim, so there is no conflict among the circuits on the question presented. Further review is not warranted.

1. Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." In *James*, this Court held that the terms "flood" and "flood waters" (478 U.S. at 605):

> apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

Accordingly, the Court reinstated dismissals of claims on behalf of individuals who had been swept through flood gates of federal flood control projects. The Court specifically rejected the claims of some of the plaintiffs that the government was not entitled to immunity

"because their injuries arose from Government employees' alleged mismanagement of recreational activities wholly unrelated to flood control," explaining that "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project" (*id.* at 609-610).

The court of appeals was correct in concluding that *James* controls this case. The waters impounded behind a dam in Lewisville Lake are "flood waters" within the meaning of Section 702c. That reservoir was constructed for the purpose, among others, of flood control. Accordingly, its contents are "waters contained in * * * a federal flood control project for purposes of or related to flood control." *United States* v. *James*, 478 U.S. at 605. Petitioner was injured in those waters. Consequently, Section 702c, as construed in *James*, required dismissal of petitioner's claims, regardless of how the government's allegedly negligent acts or omissions were described in the complaint.

Petitioner argues, in effect, that *James* must be read more narrowly, so as to permit recovery for injuries not alleged to result from a specific flood control operation. See Pet. 8 ("Petitioner contends * * * that § 702c immunity is not applicable so long as he can prove that his injuries occurred as a result of the operation of Lewisville Lake as a recreational facility, without relation to its operation as a flood control project."). Though *James* did involve injuries resulting from the active release of waters from flood control reservoirs, the Court's interpretation cannot fairly be limited to that particular fact situation. In *James*, the Court emphasized that the government's immunity under Section 702c extended to liability of "*any* kind" for "*any* damage" from flood waters at "*any* place," adding that "[i]t is difficult to imagine broader language." 478

U.S. at 604. The legislative history, the Court continued, showed "that the sweeping language of § 702c was no drafting inadvertence" and that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." 478 U.S. at 608.

The sweep of this reasoning extends beyond injuries attributable to active flood control operations. Though in *James*, recreational users of dual-purpose reservoirs were injured or killed while water was being released from the reservoirs, the Court's interpretation of the statute would apply equally to accidents occurring when the flood gates were closed or to hazards attributable to the configuration of a flood-control reservoir itself.[2] The immunity conferred by Section 702c does not apply only when the engineers in charge of a project are discharging water. However a complaint may characterize the precise cause of an injury in or on a federal flood control reservoir, the reservoir remains "flood waters" whether or not particular "operations" are being conducted at the precise time when an injury occurs.[3] As the court of appeals recognized, any

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[2] See *Richey* v. *United States*, 674 F. Supp. 780 (D.N.D. 1987) (boat struck object just below surface in dual-purpose reservoir; *James* held to bar liability).

As the court of appeals observed in this case, Section 702c has often been applied to multi-purpose reservoirs. See *Aetna Ins. Co.* v. *United States*, 628 F.2d 1201, 1203 (9th Cir. 1980) (collecting cases), cert. denied, 450 U.S. 1025 (1981).

[3] By contrast, the hypotheticals posed by petitioner—which involve tainted food and a traffic accident at a park abutting a dual-purpose reservoir—do not involve injuries resulting from "flood waters." See Pet. 17-18. To hold the government liable in such cases would not, of course, support liability here. The court of appeals in this case insisted on the showing of a sufficient "nexus" between the injury and the operation of the flood control project (Pet. App. A5).

distinction "between the active and passive operations of federal flood control facilities" is unworkable and inconsistent with *James*. Pet. App. A5-A6.

2. To the extent that it would suggest a different conclusion, *Hayes* v. *United States*, 585 F.2d 701, 702-703 (4th Cir. 1978), must be deemed to have been qualified by *James*. *Hayes* purports to recognize a distinction between operations that are related to a facility's operation as a flood control project, and those that are not. 585 F.2d at 702-703. See Pet. 8. This distinction is elusive in the context of an injury in a multi-purpose reservoir. When such an accident occurs, its cause, the presence of "flood waters" in the reservoir, is not "wholly unrelated" to the reservoir's flood control purpose, and it is difficult to pinpoint the "operation" that has given rise to the accident or to characterize that operation's purpose. The application of the distinction is further clouded by attempts, through artful pleading, to identify a variety of acts or omissions by government employees as the proximate cause of the injury. Finally, since the statute does not tie immunity to the character of the "operations" involved in a particular case, there is tension between the *Hayes* test and the language of the statute.[4]

Regardless of the results the *Hayes* test might support in cases of this type, that test must yield to the construction placed on Section 702c's plain language in *James*. The Court cannot be deemed to have contradicted its fundamental interpretation of the statute—or approved the *Hayes* court's approach to Section 702c—by including a reference to the Fourth Circuit's decision (and an accom-

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[4] *Hayes* was a two-page decision reversing the dismissal of a complaint. The Fourth Circuit cited no authority for its test, and had no occasion to elaborate upon its application beyond the particular facts of that case.

panying parenthetical) in a string citation in a footnote. 478 U.S. at 605-606 n.7.[5] See Pet. 10-15. Indeed, in *James*, this Court reversed a decision of the Fifth Circuit that, in reliance on *Hayes*, had adopted a very similar construction of Section 702c. *James* v. *United States*, 760 F.2d 590, 602-603 (1985). The Fifth Circuit had held that the government was not immune if "a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters * * *." *Id.* at 603. *James* squarely rejected this test (478 U.S. at 610-612).[6]

3. In light of the Court's decision in *James*, therefore, there is no conflict between *Hayes* and the court of appeals' decision in this case that warrants further review. Moreover, even if the application of *James* to this case were in doubt, the decision below is the only appellate decision since *James* to apply Section 702c, and thus there is not now any conflict among the courts of appeals on the application of that provision, as construed by this Court, to this type of case.

District courts have reached conflicting results. Most recently, a court held that *James* required dismissal of a case indistinguishable from this one. *Fryman* v. *United States*, No. 86-2075 (C.D. Ill. Dec. 30, 1988) (plaintiff in-

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[5] The same footnote cited the decision in *Morici*, 681 F.2d at 647-648, in which the Ninth Circuit specifically rejected the *Hayes* court's suggestion that immunity depends on "the particular use to which the project was being put when the negligence occurred." Rather, the Ninth Circuit said, in order to escape immunity, the operation that caused the damage must be "wholly unrelated" to a congressionally authorized flood control project. *Id.* at 648.

[6] Notably, in *James*, the government had actively promoted the recreational features of one reservoir and encouraged waterskiing. 478 U.S. at 599.

jured while diving into flood control reservoir at recreation area). See also *Richey* v. *United States*, 674 F. Supp. 780 (D.N.D. 1987) (boat hit obstruction in reservoir). Other courts have reached a different conclusion, primarily by reading this Court's footnote citation to *Hayes* as expressing unqualified approval of that case's rationale or as contradicting the Court's construction of Section 702c in the text of the *James* opinion. See *Denham* v. *United States*, 646 F. Supp. 1021 (W.D. Tex. 1986), aff'd on other grounds, 834 F.2d 518 (5th Cir. 1987); *de Cochiti* v. *United States*, 647 F. Supp. 538 (D.N.M. 1986). But this Court ordinarily does not grant review to resolve a conflict between decisions of a court of appeals and of the district courts. See Rule 17.1(a). The task of reconciling inconsistent district court decisions may properly be left to the courts of appeals.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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